PUBLIC PROSECUTOR

v.

IBRAHIM BIN MUSRA

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[CRIMINAL APPEAL NO. T(41) 22 OF 1994]
13 FEBRUARY 1995

***CRIMINAL PROCEDURE**: Appeal against acquittal without accused's defence being called - Whether evidence discloses prima facie case - Whether learned Magistrate misdirected himself.*

***CRIMINAL LAW**: Ingredients of charge of criminal breach of trust - Dishonest intention - Whether could be inferred from surrounding circumstances - ss. 24, 408 Penal Code.*

***CRIMINAL LAW**: Charge of criminal breach of trust - Whether actual misappropriation or conversion by accused proved - Whether it can be inferred from conduct of accused.*

The accused was the chief cashier of the Sabah Bank Bhd in Tawau and was charged for committing criminal breach of trust of RM38,901.64 punishable under s. 408 of the Penal Code. The accused had taken over as chief cashier from PW2 on 2 May 1991 and signed a certificate confirming that he had counted the cash which was in accordance with the general ledger, that he had been handed the necessary keys and had changed the combination number of the lock. Upon a cash count being conducted on 1 April 1992, the sum of RM38,901.64 was missing from the central cash and the soiled and mutilated notes categories of the Daily Cash Balance Book. As a matter of banking practice, PW1 testified that any shortage of cash should have been reported immediately but the accused had not done so. The accused was also unable to explain the shortage when asked to do so on the night of 1 April 1992. The Daily Cash Balance Book showed the amount of cash the bank had on any given day and the accused had signed the pages to confirm the amounts.

The learned Magistrate was not satisfied that a *prima facie* case had been made out on the grounds (i) the sum of RM38,901.64 was not proved to be entrusted to the accused (ii) various account books produced in Court did not cover the full period between 2 May 1991 and 31 March 1992 and no book of account was produced to show actual amount counted and handed to account on 31 April 1991 and this failure resulted in a gap in the evidence (iii) certificate signed by the accused on 2 May 1991 was not sufficient to prove entrustment as there was no evidence of a physical cash count and (iv) the cash was acessible to other staff of the bank.

On appeal by the Public Prosecutor, the key issues were (i) whether the learned Magistrate was correct in acquitting the accused (ii) whether the element of dishonest intention was established by the prosecution (iii) whether actual conversion or missapropriation of the amount had been established.

Held:

[1] The Daily Cash Balance Book indicated the amount of cash in the bank on any given day. What concerns the Court is the amount of cash as at 1 April 1992. The shortage of money is shown in the 1 April 1992 page of the Daily Cash Balance Book and the accused

had exclusive control of the keys to the cash boxes and was therefore entrusted with and was accountable for the money. There was no gap in the evidence as the amount of cash on 1 April 1992 could be ascertained.

[2] Since the accused did not at any time report the missing money, it was not possible that someone else had taken the money. The possibilities adverted to by the learned Magistrate are too remote to satisfy the balance of probabilities test.

[3] Dishonest intention could be inferred from the surrounding circumstances in this case. The accused was responsible for ensuring the amount of cash in the vault tallied with the Daily Cash Balance Book and had a duty to report any shortage. The reluctance and failure of the accused to report gives rise to the only inference that the accused had taken the money, which is dishonesty.

[4] The manner in which the money was found missing and the reluctance of the accused to send the soiled and mutilated notes to Bank Negara also showed dishonest intention. The application for leave by the accused did not rebut the dishonest intention.

[5] Actual conversion may be inferred from the conduct of the accused such as his failure to report the missing money, failure to forward soiled and mutilated notes to Bank Negara, avoiding detection of missing money by failing to arrange soiled and mutilated notes in a neat bundle, money was extracted from various bundles in such a way as to avoid detection and failure to explain to PW1 how cash was missing on 1 April 1992.

Obiter Dictum:

The case was commenced on 25 April 1992 and only ended on 6 August 1994. This was improper and contrary to guidelines issued to Magistrates and entailed great inconvenience to witnesses. Witnesses may become reluctant to come forward to testify and innocent people may as a result be convicted. Staggered criminal trials are to be avoided.

[Appeal allowed. Order of the learned Magistrate set aside. Accused ordered to enter his defence upon amended charge].

Cases referred to:
Abdullah Zawawi v. PP [1985] 2 MLJ 16 ***(refd)***
Yoong Hock Pin v. PP [1977] 1 MLJ 178 ***(refd)***
PP v. Yeoh Teck Chye [1981] 2 MLJ 176 ***(refd)***
Navaratnam v. PP [1973] 1 MLJ 154 ***(refd)***

Legislation referred to:
Penal Code (FMS Cap 45), ss. 24, 408

Other sources referred to:
Law of Crimes, Ratanlal & Dhirajlal 23rd Edn., Vol. 2, p. 1559

For the appellant - Kamal bin Md. Shahid, DPP
For the respondent - Sugumar Balakrishnan

JUDGMENT

Ian H.C. Chin J:

This is an appeal by the Public Prosecutor against the decision of the learned Magistrate handed down on 6 August 1994 by which Ibrahim bin Musra ("the accused") was acquitted of the following charge without his defence being called, *viz*.:

> That you, in between 2 May 1991, until 31 March 1992, at Sabah Bank Berhad, in the District of Tawau, in the State of Sabah, being a chief cashier in the employment of Sabah Bank Berhad, and in such capacity entrusted with certain property, to wit, RM38,901.64 (Thirty-eight thousand nine hundred one and cents sixty-four only), which was the property entrusted to you, committed criminal breach of trust in respect of the said property, and you thereby committed an offence punishable under s. 408 of the Penal Code (FMS Cap. 45) of the Laws of Malaysia.

The evidence produced at the close of the case for the prosecution are these. Chung Nyen Fatt @ Chung Kon Foh ("PW2") was the chief cashier of the Tawau Branch of the Sabah Bank Berhad ("the bank") until 30 April 1991 whence, at the end of that banking day, he handed over his duties as the chief cashier of the bank to the accused. PW2 testified that on 30 April 1991, for the purpose of the handing over, the accused counted the money in the vault for which the accused was to assume responsibility and the accused was thereafter handed the relevant keys. The money in the vault on that day was recorded in 30 April 1991 page of the Daily Cash Balance Book which was not recorded as having been produced but yet this book was sent to me together with the recorded exhibits of this case. The following day, 1 May 1991, was a holiday and it was thus, only on 2 May 1991 that the accused took over duties as the chief casier. As an acknowledgment of the handing over, the accused signed the following document ("the certificate"):

(Sample format 9)

To: The Manager
Tawau Branch

CCM (PTD)
M (IAD)

Sabah Bank Berhad
Take Over & Handover Certificate
Officer-In-Charge of Cash Department
(Part I)

Take over by: Ibrahim Bin Musra From: Chung Nyen Fatt
Dept: Cash Department Purpose/Reason: Taking over as a Chief Cashier

Effective Date: From 2 May 1991 to -

This is to certify that I, Ibrahim bin Musra have on 2 May 1991 taken over the duties of Chung Nyen Fatt and prior to doing so, I have undertaken the following:

1. **Cash Balance**

I have counted and confirmed that the cash holdings are correct as at 30 April 1991 as per the general ledger.

I have also counted and confirmed that the foreign currency holdings are correct as at 30 April 1991 as per "Notes Purchased Register" and the Notes Purchased Account in the General Ledger.

The respective cash registers have been duly countersigned by me.

2. **Keys and Combination numbers**

a) All keys (including duplicate and spare keys) kept by the outgoing chief cashier have been surrendered to me.

b) The combination numbers pertaining to the locks held by the outgoing chief cashier have been duly changed.

c) The 'Key/Combination Register' has been duly updated and the duplicate key/ combination number have been lodged with another bank/branch accordingly.

Comments (if any):

3. **Manuals and Guidelines**

I have received the related manuals/guidelines which appear to be in order.

Comments (if any):

Takeover & Handover
0138B DEC 90

A schedule of uncompleted jobs and outstanding matters that need follow up and/or urgent attention have been handed to me by the outgoing officer.

Comments (if any):

I have received all the informations that I need to enable me to take over the post of Chief Cashier of this branch.

2 May 1991	Ibrahim Bin Musra	[Signed]
Date	Name of Incoming Chief Cashier	Signature

(Part II - to be signed by the Outgoing Chief Cashier & Branch Manager)

I am satisfied that Ibrahim Bin Musra has carried out sufficiently a takeover programme and has been given all explanations as will enable him to carry out the duties as the branch Chief Cashier.

2 May 1991	Chung Nyen Fatt	[Signed]
Date	Name of the Outgoing Chief Cashier	Signature
	Lawrence Chung	[Signed]
Seen by		
	Name of Branch Manager	Signature

The certificate which the accused signed confirmed he had counted the cash and that they were in accordance with the general ledger, he had been handed the necessary keys and had changed the combination number of the lock. Among the books of account other than the general ledger which the bank maintained is the said Daily Cash Balance Book. The Daily Cash Balance Book shows the daily entries to indicate the balance of all the cash of the bank at every banking day and which amount the accused was accountable as the chief cashier. The cash recorded in the Daily Cash Balance Book is classified under four categories, namely, (a) Central Cash; (b) Cash in Reserve; (c) Teller Cash Boxes; and (d) Soiled and Mutilated Notes. The Daily Cash Balance Book containing 30 April 1991 - page was, as mentioned earlier, not produced. The exact amount that was counted on 30 April 1991 was

therefore not known. The accused took charge of this Daily Cash Balance Book from 30 April 1991. Thereafter, on the next working day, which is 2 May 1991, the accused began to make entries and put his signature in the Daily Cash Balance Book and entries were made at the end of each banking day. The cash of the four mentioned categories, that is the central cash, the cash in reserve, the teller cash boxes and the soiled and mutilated notes, must tally with what is recorded in the Daily Cash Balance Book at the end of every banking day. The money described as the central cash were stored in a tin box with built-in wheels. Each teller would be assigned a teller cash box in which the teller concerned would keep the cash until the end of each banking day when the box was then handed to the accused. The accused would give the various tellers the teller cash boxes every morning and the keys to these boxes were kept by the individual tellers. Any amount in the cash box that exceeds RM25,000 should be handed to the accused as the chief cashier and where there was insufficient cash in the box, the teller would request for more from the accused and the accused would take from the central cash to replenish the teller cash box. All these movement of cash from the central cash would be recorded. The cash in reserve was kept in a safe controlled jointly by then branch manager Chung Thau Yin ("PW1") and the accused and this safe was kept in the part of the vault that was sealed off by a grill that can be locked. The soiled and mutilated notes were notes that were not to be recirculated because of their soiled or mutilated condition and were kept locked in a box and the key of which was kept by the accused. These notes were to be neatly bundled up and returned to Bank Negara when the amount reaches RM30,000 or more. All these four categories of cash were kept in a vault.

The vault has a door which can be opened by turning the two correct combination numbers, one combination of which was known to the manager while the other to another officer. The numbers are also sealed and kept in another bank which can be obtained, after satisfying certain security formalities, in case any of the officer with knowledge of the number cannot be located. Inside the vault, one section is sealed off by a grill with a lock. At the material time, the accused was the only person who had the key which can unlock the grill. It was, as mentioned earlier, in this sealed off part of the vault that the four categories of cash were kept. A spare key was kept with another bank which can be obtained in the same event and manner as for the combination numbers and the record shows that this spare key was not during the time accused was the chief cashier taken out from the other bank. Inside the grill section of the vault was, as mentioned earlier, a safe with was operated by combination numbers, which numbers were known only to the accused, and by key which was kept by PW1. Again the spare key and combination numbers were kept in different banks and the record show they were not taken from the banks concerned during the period the accused was the chief cashier. It was also established that during the period concerned the accused did not take any leave.

It was also established that the accused was told by PW1 on several occasions to sent the soiled and mutilated notes to Bank Negara. On 9 March 1992, the accused applied for leave which was to take effect from 2 April 1992. On 31 March 1992, PW1 wanted to conduct a cash count of the soiled and mutilated notes but the accused said he had left the key to the box which held the notes in his house. It was only the next day, that is 1 April 1992, that the accused unlocked the box containing the soiled and mutilated notes. A count was then made of the notes by PW1 and other officers and witnessed by the accused who declined the invitation to take part in the count. The amount of cash of the four categories as at 1 April 1992 should be as stated by the accused in 1 April 1992 - page of the Daily Cash Balance Book, *viz*.:

Daily Cash Balance Book

Date: 1 April 1992

		Central Cash	Cash in Reserve	Total
Usable Notes:	RM1,000	11,000.00		
	RM500	19,500.00		
	RM100	58,900.00		
	RM50	206,150.00	600,000.00	
	RM20	8,220.00		
	RM10	7,030.00	270,000.00	
	RM5	305.00	70,000.00	
	RM1			
	Chgn	30.00		
Coins:	RM1	1,002.00		
	50 cts	2,951.50	17,000.00	
	20 cts	406.80	18,000.00	
	10 cts	264.90	17,200.00	
	05 cts	1,415.10	6,000.00	
	01 cts	93.89	400.00	
		137,050.00		
Special Issues:				
	Sub-Total		998,600.00	
Cash Boxes: Teller No:	**1**	24,798.27		
	2	16,798.73		
	3	16,804.07		
	4	14,799.79		
	5	21,537.50		
	6			
Soiled and Mutilated Notes				
	RM1000	6,000.00		
	RM 500	11,500.00		
	RM 100	15,800.00		
	RM 50	12,500.00		
	RM 20	4,400.00		
	RM 10	20,020.00		

RM 5	19,620.00		
RM 1	29,483.00		
Petty Charges			
Balance as per general ledger	646,843.05	998.600.00	1,645,443.05

Amount in words: One million six hundred forty five thousand four hundred forty three and cts five only.

Cash Tallies (Serial No. & Colour used)

Chief Cashier **Officer-in-charge**

(Signature).....[Signed]..... (Signature).....

It was after the count that it was discovered that notes were missing from two categories of the funds, the soiled and mutilated notes and the central cash. As for the soiled and mutilated notes, the missing notes were:

Denomination	Amount According to Book	Actual Amount Counted	Deficit
RM1,000	6,000	6,000	None
RM500	11,500	9,000	2,500
RM100	15,800	10,500	5,300
RM50	12,500	10,400	2,100
RM20	4,400	4,240	160
RM10	20,020	19,850	170
RM5	19,620	19,440	180
RM1	29,483	29,404	79
Total	119,323	108,834	10,489

The amount discovered to be missing was RM10,489. The notes were found to be in a mess instead of being neatly bundled up. The accused had once before, on 17 December 1991 sent to Bank Negara soiled and mutilated notes totalling RM39,000 leaving a balance then of RM65,884. Nothing was found missing from the fund of the cash in reserve nor from the teller cash boxes. But cash was also found missing from the central cash, *viz*:

Denomination	Amount According to Book	Actual Amount Counted	Deficit
Usable Notes RM1000	11,000.00	11,000.00	None
RM500	19,500.00	19,500.00	None
RM100	58,900.00	52,800.00	6,100.00
RM50	206,150.00	183,900.00	22,250.00
RM20	8,220.00	8,220.00	None
RM10	7,030.00	7,030.00	None
RM5	305.00	305.00	None
Ch&gm	30.00	30.00	None
Coins : RM1	1,002.00	958.00	44.00
50cts	2,951.50	2,926.00	25.60
20cts	406.80	383.20	23.50
10cts	264.90	311.00	None
			Credit - 46.10
05cts	1,415.10	1,410.35	4.75
01cts	93.89	83.00	10.89
Total deficit	137,050.00	108,637.36	28,412.64

The money in the central cash that was found missing was missing from various bundles of the notes. The total amount missing from the central cash and from the soiled and mutilated notes was therefore the sum of RM38,901.64. PW1 explained that though his signature also appeared in the Daily Cash Balance Book, he did not count the soiled and mutilated notes because he relied on the accused to do that and because the notes were not bundled up but in a mess. As for the notes of the central cash, he counted the bundles only and not piece by piece when he put his signature. He also testified that, as a matter of banking practice, if the accused had found any shortage of cash at any day, he should have reported to him immediately but that there was never any such report by the accused. It was also in evidence that the accused was on the night of 1 April 1992 asked by PW1 to explain the shortage of cash but was not able to. The learned Magistrate was not satisfied that a *prima facie* case had been made out because, according to him, the prosecution had failed to prove that the sum of RM38,901.64 was entrusted to the accused. The learned Magistrate reasoned that the various account books produced in Court did not cover the full period between 2 May 1991 and 31 March 1992 and no book of account was produced to show the actual amount that was counted by and handed to the accused on 31 April 1991. He concluded that the failure to produce those documents had resulted in a serious gap in the evidence and cited *Abdullah Zawawi v. PP* [1985] 2 MLJ 16 and *Yoong Hock Pin v. PP* [1977] 1 MLJ 178. He continued that the fact that the accused had signed the certificate when taking over duties as a chief cashier was not sufficient to prove entrustment because there was no evidence

that there was a physical count of the cash when the certificate was signed. He added that the cash was accessible to other staff of the bank who can get the key to open the grill from the accused and the keys to the various boxes holding the central cash and the soiled and mutilated notes can be duplicated. Determining the evidential worth of 1 April 1992 - page of the Daily Cash Balance Book would resolve the issue whether there was any evidence that the accused had been entrusted with money and how much was entrusted between the period of 2 March 1991 and 31 March 1992 and how much was missing. It must be borne in mind that the Daily Cash Balance Book, as the name suggests, contain the amount of cash and their denominations, the bank has on any given banking day. In this case, we should be concerned only with the cash in the category called central cash and in the category called soiled and mutilated notes. The person in charge of this book, as the evidence show, must make entries at the end of each and every banking day and after he had counted the money to ensure the physical count tallies with the entries. For the period from 2 May 1991 to 1 April 1992, the person in charge of the Daily Cash Balance Book was the accused and it was the accused who had, since 2 May 1991 made daily (banking days) entries to show the amount of cash that can be found in the bank in the said two categories. Every page of the Daily Cash Balance Book stands on its own in that any page that you flag will be indicative of the amount of cash the bank has on that day. All the pages were signed by the accused to indicate that there was that amount. Thus, is any one wants to check how much cash there was in the bank on that day, he needs only look at the page of the Daily Cash Balance Book of that day and compare the figure with the physical count of the cash. If they tally, nothing is amiss. If they do not and the amount counted is less than the shown in that page of the Daily Cash Balance Book, then there is a shortage. In so far as entrustment is concerned, the amount the accused was trusted with varied from day to day. For the purpose of this case, in order to find out the amount he was entrusted with as at 1 April 1992, the Court need only look at the 1 April 1992 - page of the Daily Cash Balance Book. This page had to be taken because the physical count of the money was done on 1 April 1992. This page has been reproduced above and the shortage of RM38,901.64 has also been adverted to above. This money was missing when the accused had the exclusive control of the keys to the boxes containing the central cash and the soiled and mutilated notes. This money was missing when the accused was the chief cashier and was entrusted and accountable for the money. Given what I have said, it matters not that the books of account of the dates prior to 1 April 1992 have not been produced because we are not concerned with the amount of the cash of those days but only with the amount of the cash as at 1 April 1992. The accused was entrusted with the daily balance of the moneys in the bank as from 31 April 1991 until 1 April 1992 and he is accountable for the balances shown in the Daily Cash Balance Book for every day of that period. This is where the learned Magistrate had misdirected himself. He was of the erroneous view that without the books of account pertaining to 31 April 1991, the date the accused was handed the money of the bank after he had counted them, there was a gap in the evidence. This can only be true if without that page, the amount entrusted to the accused as at 1 April 1992 cannot be ascertained, but, as was pointed out earlier, every page of the Daily Cash Balance Book shows exactly how much the accused was entrusted with on each particular day and therefore it suffices to merely refer to 1 April 1992 page of the Daily Cash Balance Book to ascertain how much the accused was entrusted. What more, when the accused himself signified, by signing on the document, the amount that was supposed to exist and that this signature was only to be appended after the accused had counted the money at the end of every banking day and which central cash and the soiled and mutilated notes he had exclusive control.

The learned Magistrate also ruled, as a result of a view of the *locus in quo* held on 1 October 1993, that the boxes containing the missing money were accessible to other staff of the bank by getting the key from the chief cashier. The padlocks of these boxes, according to the learned Magistrate, could be opened by duplicate keys and therefore, because there was no direct evidence that the accused had taken the money and, presumably, because the learned Magistrate did not say so expressly, it was possible for someone else other than the accused who took the money. With all due respect, the learned Magistrate appears to have gone on a flight of fancies. The first question which the learned Magistrate should have asked himself is - when was it that this money could possibly have been taken by someone else? It could not have been 31 March 1992 because the accused had certified, after he was supposed to have counted the money, that the cash was all there in the two boxes and he did not report to PW1 that any money was missing. Similarly, the accused had not at any time before 31 March 1992 and from the time he took charge of the money on 31 April 1991 reported that any money was missing from the two boxes. How, then could it be possible that someone else other than the accused had taken the money when the accused himself had never complained that any money was missing. All sorts of possibilities exist, but some will be too remote to satisfy the balance of probabilities test. The possibilities adverted to by the learned Magistrate and which I have just referred are too remote. Next to be considered is the ingredient that the accused must have committed criminal breach of trust, which was not dealt with by the learned Magistrate because he felt what he had decided was sufficient to discharge and acquit the accused.

Mr. Sugumar Balakrishnan, Counsel for the accused both here and below, submitted that there was not one iota of evidence to show dishonest intention on the part of the accused. As for the law, learned Counsel submitted and I agree, it is essential for the prosecution to establish there was dishonesty (*PP v. Yeoh Teck Chye* [1981] 2 MLJ 176; *Navaratnam v. PP* [1973] 1 MLJ 154. The definition of "dishonesty" can be found in s. 24 of the Penal Code which says:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly".

Intention is, of course, not a matter of direct proof but to be inferred from the surrounding circumstances. Could such dishonest intention be inferred in this case? I am of the view that it can.

At the end of each banking day, the accused must count the cash he was entrusted with to ensure that the amount in the vault tallied with that stated in the Daily Cash Balance Book. It is also established that the accused must immediately report to PW1 if there is any shortage of the money in the vault. The accused had never reported any shortage giving rise to the inference that he knew there was a shortage but never reported because he had taken the money or that he did not bother to count the money because he knew there was the shortage and the only way he knew and the reason he kept quiet was because he took the money. In any case, any report would reveal the shortage. The reluctance and failure of the accused to report, it can be inferred and it being capable of this inference only, was because the accused had taken the money. This surely is dishonesty on the part of the accused.

The accused knew he had to send the soiled and mutilated notes to Bank Negara when they accumulated to RM30,000 or more. In fact, he had on 17 December 1991 forwarded such notes totalling RM39,000 when the amount had reached RM104,884 instead of the whole sum. It

must be borne in mind that these monies were to be taken out of circulation and the sooner they were replaced with new ones or the bank credited with the amount in replacement by Bank Negara the more benefit the bank would derive by being able to utilise the amount represented by the soiled and mutilated notes. Therefore, the only reason the accused did not remit all the soiled and mutilated notes to Bank Negara on 17 December 1991 and did not remit any thereafter even though by 10 March 1992 the amount had snowballed to RM105,180 can only be that the accused wanted the fund to remain in the vault so that he can have his hands to them whenever he needed money since such money though soiled or mutilated can still be legal tender or be swapped at other banks for clean notes to use. It can also be that if the whole amount of the soiled and mutilated notes were sent away to Bank Negara, it would be immediately noticeable to PW1 that there was a shortage of the money. For either reason, the dishonest intention of the accused can be inferred.

As for the money missing from the central cash, it is in evidence that the notes were missing from neatly bundled up notes, that is, the bundles did not contain the number of pieces of notes that they should. The money was missing from various bundles and PW1 only did bundle count and not piece by piece of the notes which means that any note missing from any bundle would be missed by PW1. This was what happened. PW1 had testified that he merely counted the bundles not piece by piece and that was the reason why he failed to notice the missing notes. The accused knew of the manner in which PW1 conducted his count of the money in the central cash. It could be inferred from the manner in which the notes were found missing from the various bundles that the accused had a dishonest intention. It must be borne in mind that the accused did not deal with the public over the counter not like the tellers but the accused only dealt with the tellers who would get or give him notes and all these were counted every time and thereafter recorded. There is no evidence to suggest that the money missing from the central cash could be due to the fact that the tellers had any time shortchanged the accused that resulted in the shortage of the money from the central cash. Again, given the circumstances I have just adverted to and the fact that there was no report by the accused that any cash was missing, the loss of the money can only be due to the dishonest intention of the accused.

It was submitted by learned Counsel that the fact that the accused had on 9 March 1992 applied to go on leave from 2 April 1992, the accused thus knowing full well that there will be a thorough count of the cash when someone takes over from him while he was on leave, goes to support the contention that the accused had no dishonest intention. I am unable to agree. Given the fact that the accused very well knew that the missing money would be discovered eventually whether he goes on leave or not, the letter does not in any way create any doubt in the presence of the dishonest intention on the part of the accused. In the face of the failure of the accused to remit the said notes to Bank Negara and the failure to report the missing money to PW1, the application for leave of the accused cannot by itself constitute evidence as casting a doubt on a balance of probabilities as regards the presence of dishonest intention. In fact, the accused would create more suspicion if he did not take his annual leave because it would show he was reluctant to hand over his duties which handover would have entailed a thorough count of the cash he was holding. Given what I have said, I do not see how the leave application of the accused "rebuts dishonest intention" as contended by learned Counsel.

It was also contended by learned Counsel that the prosecution had failed "to adduce even an iota of evidence to show that the accused had indeed misappropriated or converted the sum of RM38,901.64". It is the law that the actual conversion need not be proved but can

be inferred from the conduct of the accused (*Ratanlal & Dhirajlal's Law of Crimes*, 23rd Edn., Vol. 2, p. 1559). The following conduct of the accused justify the inference that the accused had misappropriated the money, *viz*:

(1) he failed to report the money missing from the central fund and the soiled and mutilated notes which he ought to know was missing at the end of at least some of the banking days if not all;

(2) he failed to forward all the soiled and mutilated notes to Bank Negara when he had the opportunity but only sent RM39,000 on 17 December 1991 instead of the full amount of RM104,884;

(3) he failed to arrange the soiled and mutilated notes in neat bundle and thus prevented the counting of the notes by PW1 and thus avoided detection of the missing money;

(4) the missing notes of the central cash, which were handled by the accused, were missing by various pieces from various bundles making detection of the missing money avoidable and this manner of extracting money from the bundles was, it can be inferred, done by the accused to avoid detection since he knew PW1, the only other person who could count the cash the accused was holding, only counted by reference only to the number of bundles of notes and not by counting the pieces in each and every bundle; and

(5) he failed to explain to PW1 on the night of 1 April 1992 how the cash came to be missing.

Learned Counsel had also adverted to the hitherto exemplary service record of the accused and the unfair domestic inquiry all of which I am of the view do not have any bearing, in any event not at this stage of the proceedings, as to the fact that the accused was entrusted with the money and had dishonestly misappropriated it.

I therefore allow the appeal of the Public Prosecutor and set aside the order of the learned Magistrate discharging and acquitting the accused. I, instead, order the accused to enter upon his defence upon the charge to be amended by replacing the date "31 March 1992", stated in the charge, with the date 1 April 1992". The learned Magistrate shall call upon the accused to plead to the amended charge and the accused shall be entitled to recall any of the witnesses for further cross-examination.

Some comments are called for in respect of the manner in which the learned Magistrate had conducted the hearing of this case. This case was commenced in the Magistrates' Court on 25 April 1992 and only ended on 6 August 1994. Below is a table showing the sessions of sitting, *viz*:

No.	Dates	Nature of Proceedings
1.	25 April 1992	Charge mentioned and the case was fixed for hearing on 17 July 1992.
2.	18 July 1992	Accused requested for adjournment to get lawyer. Adjourned to 3 September 1992 for hearing.
3.	3 September 1992	Hearing proceeded and accused request for adjournment to look for Counsel was turned down. Adjourned to 12 October 1992 (3 days reserved) for continuation of trial.

4.	4 September 1992	Erstwhile defence Counsel turned up and applied for adjournment on ground he has not obtained cautioned statement. Hearing was adjourned to 12 October 1992 (3 days reserved).
5.	12 October 1992	Magistrate had gone on course. Case adjourned to 22 February 1993 (5 days reserved).
6.	22 February 1993	Case for unknown reason did not proceed and was adjourned by another Magistrate to 24 February 1993.
7.	24 February 1993	Hearing resumed and continued till 26 February 1993 whence it was adjourned to 9 June 1993 (4 days reserved)
8.	9 June 1993	Prosecutor was in Kota Kinabalu as a witness in a case. Case was adjourned to 27 September 1993 (3 days reserved)
9.	27 September 1993	Hearing did not resume.
10.	29 September 1993	Hearing resmed and adjourned to 1 October 1993.
11.	1 October 1993	Hearing resumed and adjourned at 11.20 a.m. "the Court room is not available now". Case was adjourned to 11 November 1993 (2 days reserved).
12.	11 November 1993	Case was adjourned to 9 March 1994 (4 days reserved) because defence Counsel wanted to celebrate Deepavali on 12 November 1993 but was nevertheless prepared to proceed for one day only. Prosecutor said he preferred the case to be adjourned if the hearing is only for one day.
13.	9 March 1994	Hearing resumed. The second witness began his evidence. Hearing continued until 11 March 1994 whence it was adjourned to 18 May 1994 (3 days reserved). By this time, seven witnesses had testified.
14.	18 May 1994	Hearing resumed. Prosecution closed its case. Adjourned to 6 August 1994 for ruling.
15.	6 August 1994	Magistrate rule no *prima facie* case. Accused was discharged and acquitted.
16.	?? November 1994	Grounds of decision given after Notice of Appeal was filed on 11 August 1994.
17.	19 November 1994	Petition of Appeal filed.
18.	23 December 1994	Record of Appeal transmitted to High Court and the appeal was heard on 13 January 1995.

The manner in which this case had been tried and which I have chronicled above is not an example to be followed by any Magistrate. The impropriety was pointed out to the learned Magistrate by a guideline which I issued on 31 July 1993, *viz*:

To all learned Sessions Judges, Magistrates and Senior Assistant Registrars exercising jurisdiction in Semporna, Lahad Datu and Tawau.

Guideline - 1

Trial - Continuous Sitting

1. The trial of any particular case must, barring circumstances which the law makes allowance for, be conducted and be concluded over one sitting. The practice of broken trial or hearing over a long period with several separate sittings in respect of a case is an anathema to the administration of justice. As soon as an accused person pleads not guilty, sufficient days must be allotted immediately for the hearing of the case so that the case can be concluded in one sitting. The presiding officer with information from the prosecution should be able to estimate the number of days required for the hearing. As regards requests for adjournment, the presiding officer should be guided, where relevant, by cases like *Public Prosecutor v. Karumah* [1980] 2 MLJ 102; *Public Prosecutor v. Moktar bin Abdul Latiff* [1980] 2 MLJ 51; and *Public Prosecutor v. Tan Kim San* [1980] 2 MLJ 98. When a case has been adjourned, sufficient days should be allotted for the continuation of the adjourned hearing so that the hearing can be concluded in one sitting. Delayed and broken trials are substantial obstacle in the way of justice. See *K. Ratnasingam v. Kow Ah Dek & Anor.* [1983] 2 MLJ 297.

2. The practice of allotting just one day for the trial of a particular case when it is obvious such length of time will not be sufficient to dispose of the case should not be continued. All single days alloted for the trial cases on that day must be vacated and new sufficient days allotted for the trial of these cases with a view to disposing these cases in one uninterrupted sitting.

3. The practice of hearing more than one trial on the same day must also cease immediately.

4. For all part heard cases, new dates must immediately be assigned to complete and dispose of these cases. These cases take priority over other cases yet to be heard.

Prompt Delivery of Grounds of Decision

5. Grounds of decision must be given promptly. As to the length of time allowed, see *Public Prosecutor v. Kian Mei Sdn. Bhd.* [1992] 4 CLJ 2168, at p. 2172, for a summary of the cases concerning delay to get an idea as to the time frame for the delivery of the grounds of decision and the reasons for promptitude.

6. Judgment must be written and the quality and number of judgment will definitely influence decisions regarding promotions.

Dated 31 July 1993.

[Signed]
Ian H.C. Chin,
Judicial Commissioner,
High Court in Borneo at Tawau.

Therefore, by 31 July 1993, the learned Magistrate, after the receipt of this guideline, was aware that the manner he had conducted the trial of this case up to that time was not proper. Regrettably, he appears to ignore the guideline because he continued to hear this case in a staggered manner. Then came the decision of the Supreme Court on this very subject and I immediately after reading the case issued yet another guideline on 12 January 1994 which reads:

To all judicial officers exercising jurisdiction in the Subordinate Courts of the Residency of Tawau.

Guideline - 3

Trial - Continuous Sitting

Your attention is drawn to the Supreme Court case of *Tan Hun Wah v. PP* [1994] 1 AMR 3: 113 where the Court, *inter alia*, held:

(1) the accepted practice and procedure of criminal trials requires criminal trials to be carried out from day to day until conclusion unless it is absolutely necessary to adjourn the trial.

(2) part heard case should not be adjourned *sine die* as the quality and reliability of the judgment of the Court would be affected in relation to evaluation of the demeanour of witnesses during cross-examination and certain primary evidence.

(3) submissions must be made orally when the evidence is still fresh in the mind.

(4) the accused had a right to fair trial and this principle will be applied rigorously where the excessive delay is caused by the Court; and

(5) the accused/appellant was prejudiced by the delay in the trial, which was spread over the whole year of 1988, and also by the delay in supplying the grounds of judgment, which was given about 3 years after the decision.

I have already in my previous two Guidelines issued to you warned you against staggered trials and delayed judgment. The highest Court of the land has now issued its warning. The Hon. the Chief Justice of Borneo had also issued to all of you his directive regarding writing judgment. Please therefore heed the said guidelines, directive and decision. If you have criminal trials, for that matter civil trials as well, and preliminary inquiries yet to be completed, complete them immediately.

Dated 12 January 1994.

Justice Ian H.C. Chin

Despite this subsequent guideline, the learned Magistrate continued to stagger the trial over another two sessions. When he finally finished the trial more than two years after he had commenced hearing this case, he also did not follow the directive of the Honourable the Chief Judge (previously known as the Chief Justice) when he did not deliver his grounds until November 1994 which is 3 months after his ruling instead of 6 weeks. Quite apart from the reasons which I have already adverted as to why the trial should not be staggered and held over a long period, it is also for the reason that witnesses will all the time be summoned and be waiting in Court for their turn to give evidence. These people will be greatly inconvenienced if they have to come back to the Court again and again because a Magistrate chose to hear a case in a staggered manner or who postponed hearing without valid reason or who carelessly calculated the time required for the trial of a case. It was fortunate that all eleven witnesses in this case came from Tawau but that can never be the excuse for conducting the trial of this case in the manner the learned Magistrate had done. It is not only that the Court had been unfair to the witnesses but justice had been depicted by such conduct as being uncaring and extremely troublesome since witnesses had been shepherded in and out of Court on so many occasions and over a period of two years. In the end, witnesses of crime will not come forward to help the enforcement authority to nab the criminals because they just do not want to go through such rigmaroles if they are led to believe that all trials are conducted in the tiresome manner in which it was done in this case. As a result, innocent people may be convicted because witnesses who saw what actually happened did not come forward to testify. Justice cannot be so blind as to be unaware of or

uncaring of the inconvenience that such manner of trial would cause to witnesses, not to mention the prejudice to the accused. I can assure the public that on the whole the Courts do not conduct their affairs in the manner of this case and therefore the public should not, for fear that the trial will inconvenience them, refuse to come forward, to assist the authority to solve crime. I have to say this because I want to persuade the public not to have the attitude of "I do not want to get involved" and of not wanting to become a witness. Experienced prosecutors will be able to tell when each witness will give evidence and thus will allow witnesses whose turn have not come yet to go on with their daily chores if that is possible. Whatever it is, in the end the well being of our community very much depends on having a lot of people who do not possess the "I do not want to get involved" attitude and who will do their part to fight crimes and who will come forward to help. The Court will play its part to make sure that they, as witnesses, will not suffer the unpleasant experience of shuttling time and again to and from the Court.

As for this case, I direct the Deputy Registrar of the High Court in Tawau to ensure that this case is completed over one continuous sitting and, for this purpose, to fix 10 days for the continuation of this trial and if necessary to adjourn any other case in the event of any spillover so that this case can finally be disposed of in accordance with what the law says.